SUPREME COURT, U. S.

SEP 26 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 73 551

NINA JOAN SMITH,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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IN THE

SUPREME COURT OF THE UNITED STATES

No. -

NINA JOAN SMITH,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

NINA JOAN SMITH PETITIONS FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI ENTERED IN THE ABOVE-ENTITLED CASE ON MAY 28, 1973; AND DENIED FOR REHEARING ON JUNE 18, 1973

OPINION BELOW

Opinion of the Supreme Court of the State of Mississippi is reported in 278 So.2d 454, and is appended hereto as a part of this Petition.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C., Sec. 1257(3) and Rule 19(B) of the Rules of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States of America:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis added).

2. Amendment XIV to the Constitution of the United States of America:

> "Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law."

QUESTIONS PRESENTED

I

Should the Supreme Court of the State of Mississippi have considered the instruction given by the State during the trial of the case under Rule 42 of the Mississippi Supreme Court; since the instruction given by the State came under "Plain Error" rule?

II

Does Rule 42 of the Mississippi Supreme Court stand contrary to the decisions of the Federal Courts, since no rule of a Court can modify or abrogate the substantive law and thus violate the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States of America?

STATEMENT OF THE CASE

The Petitioner, NINA JOAN SMITH, was convicted on the 7th day of August, 1972, in the Circuit Court of Jackson County, Mississippi, after trial by jury, on a charge of manslaughter for which she was sentenced to ten (10) years imprisonment.

An Appeal was prosecuted to the Supreme Court of the State of Mississippi and a decision was rendered, which said decision is reported in 278 So.2d 454, and is appended hereto. Subsequently a Petition for Rehearing was filed in the Supreme Court of the State of Mississippi, which was denied. The Federal questions relating to violation of constitutional rights was raised on petition for a rehearing in the Mississippi State Supreme Court.

SUMMARY OF THE ARGUMENTS

A. It would have best served the cause of justice if the Supreme Court of the State of Mississippi had considered the instruction given by the State during the trial of the case.

Rule 42, Mississippi Supreme Court Rules, provides as follows:

> "Whereas, the judges of the Circuit Courts of Mississippi have adopted uniform rules of procedure for the Circuit Courts, and among those rules adopted is Rule 14 requiring attorneys to file jury instructions with the Circuit Clerk and to deliver copies of

instructions proposed to be given the jury to opposing counsel before the trial.

"The Rule further provides that attorneys are required to dictate their specific objections to an instruction offered, thus giving the trial judge an opportunity to pass upon the objections before the case is argued before the jury.

"After considering the foregoing rule, we are convinced that it will add in promoting better judicial procedure and should be implemented by this Court. It is, therefore, the rule of this Court that no assignment of errors based on the giving of an instruction to the jury will be considered on Appeal unless specific objection was made to the instruction in the trial Court, stating the particular ground or grounds for such objection. However, in extreme cases this Court may raise an objection to a jury instruction in order to prevent manifest injustice. This rule shall take affect and be in force as to all cases tried after June 1, 1971."

The instruction which the Supreme Court of the State of Mississippi refused to consider because of the provisions of its Rule 42 and which was granted by the trial Court is as follows:

"The Court instructs the jury for the State that even though you find that Roland Broadhead, deceased, was attempting to commit a crime by assulting the Defendant, yet the Defendant, Nina Joan Smith, was not entitled to take the life of Roland Broadhead by shooting him with a pistol, a deadly weapon, unless you further find from all the evidence on this case that the Defendant, Nina Joan Smith, at the very time of the shooting, had reasonable grounds to believe, and did believe that the deceased had a present intention to kill her, or do her great bodily harm, and further that there

was, then and there, imminent danger of such intention being accomplished; mere fear, belief and apprehension is not sufficient, no matter how sincerely believed by the Defendant, the danger to the Defendant must be such that a reasonable person in the circumstances then and there existing would believe that the killing was necessary in order to prevent herself from being killed or receiving great bodily harm, and even then the Defendant acts at her own peril, she is not the final judge of the reasonableness of her fear or apprehension, that she is about to be killed or receive great bodily harm, nor is she the final judge of the reasonableness of the use of a deadly weapon under the circumstances then and there existing, but rather it is you, the jury who determines from all the evidence in the case, the reasonableness of the apprehension and belief of the Defendant that the deceased intended to kill her or do her great bodily harm, whether there was immediate danger of the deceased accomplishing such intent, and the reasonableness of her use of a deadly weapon under the conditions and circumstances then and there existing, and this is so even though she was being assaulted by the deceased, the law tolerates no excuse, and gives no justification of the taking of a human life by use of a deadly weapon, upon the plea of self-defense, unless it was reasonably necessary to prevent the deceased from killing the Defendant or doing her great bodily harm *at the very instant of the fatal shooting.* (Emphasis supplied)

B. The Supreme Court of the State of Mississippi should have considered the instruction under the provisions of its own Rule 42, since this instruction had been previously condemned by the Court on numerous occasions, it being an "at the very instant of the fatal shooting" instruction.

The Supreme Court of the State of Mississippi in passing its Rule 42 has abrogated and modified the substantive law.

C. Rule 42 of the Rules of the Supreme Court of the State of Mississippi modifies and abrogates the substantive law since Section 1530 of the Mississippi Code of 1942, as amended and annotated, states as follows:

> "The judge in any cause, civil or criminal, shall not sum up or comment on testimony or charge the jury as to the weight of evidence; that at the request of either party he shall instruct the jury on the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the Court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The Clerk before they are read or given to the jury, shall mark all instructions asked by either party, or given by the Court, as being "given" or "refused", as the case may be, and all instructions so marked shall be a part of the record, on appeal, without a Bill of Exceptions."

To say anything to the contrary is to simply hold rules above justice. A rule is not appealed; the trial record is appealed. Therefore, the entire record is on appeal, even those instructions that were not objected to, and such should be considered by the Supreme Court of the State of Mississippi on all appeals.

ARGUMENT

POINT ONE

IT WOULD HAVE BEST SERVED THE CAUSE OF JUSTICE IF THE SUPREME COURT OF THE STATE OF MISSISSIPPI HAD CONSIDERED THE INSTRUCTION GIVEN BY THE STATE DURING THE TRIAL OF THE CASE.

The instruction complained of has been heretofore set out in full under Section A of the Summary of the Argument. This instruction was an instruction which has been termed an "at the very time of the fatal shot" instruction.

In *Nicholson v. State of Mississippi,* 243 So.2d 552, the Supreme Court of the State of Mississippi held that such an instruction is erroneous and does not accurately instruct the jury of the rule of law insofar as criminal intent is concerned.

In *Nicholson* the instruction was as follows:

"The Court instructs the jury for the State of Mississippi that the law tolerates no excuses and accepts no justification for the taking of human life upon the plea of self-defense, unless it be reasonably necessary to save the life of the Defendant or save the defendant from great bodily harm *at the very time of the fatal shot.* And if you believe from the evidence beyond a reasonable doubt that the defendant, Floyd Lamar Nicholson, shot and killed Harold D. Hardy at a time when he was not in any immediate danger, real or apparent, of loosing his life or suffering great bodily harm at the hands of the deceased, Harold D. Hardy, then the defendant, Floyd Lamar Nicholson, is guilty of murder if he acted of his malice aforethought." (Emphasis added)

In its opinion the Court went on to say:

"This Court has heretofore held that this erroneous instruction does not accurately instruct the jury of the rule of law insofar as criminal intent is concerned. We have condemned the use of this instruction in the following cases: *Dobbins v. State*, 207 So.2d 96 (Miss.) (1968); *Davis v. State*, 220 Miss. 818, 72 So.2d 172 (1954); *Johnson v. State*, 46 So.2d 924 (Miss. 1950); *Irby v. State*, 186 Miss. 161, 185 So. 812 (1939); and *Vance v. State*, 182 Miss. 840, 183 So. 280 (1938).**" [footnote omitted]

Not only was the instruction complained of one which had been on numerous occasions condemned by the Supreme Court of Mississippi as an "at the very time" instruction, additionally, this instruction is one which is repetitious, unnecessarily long and confusing to the jury. (We ask the Court to determine how many times it must read the instruction in question before it can clearly and distinctly understand its meaning, if, in fact, a clear and distinct understanding is possible).

In *Lecaze v. U.S.* (C.A. Miss. 1968), 391 F.2d 516, it was held that repetitious and unnecessarily long charges are confusing to the jury and can be prejudicial.

In a criminal case, the accused has the right to demand that the prosecution state the law clearly and distinctly, and the instruction must be cognate to the specific crime charged. The purpose of instructions is to inform or instruct the jury. An instruction which, by prolixity, creates confusion, should be condemned.

Certainly by refusing to consider the assignment of error as to the instruction, the Supreme Court of the State of Mississippi has denied Nina Joan Smith due process of law and equal protection under the law since the Court previously had condemned the instruction

questioned on numerous occasions. The only reason given by the Supreme Court of Mississippi for refusing to consider such assignment of error was its rule 42, which provides that such assignment will not be considered since timely objection to such instruction was not made by counsel.

If, in fact, this was the only reason that the Court refused to consider the assignment of error, is this justice?

Would the cause of justice have best been served if the Court had considered the disputed instruction?

Justice is the constant and perpetual disposition to render every man his due.

If this be justice, then did the Court tender justice unto Nina Joan Smith.

Here was a woman approximately thirty (30) years of age, with seven (7) children. She was disposed to assist in providing income for her family. As the result of a terrible incident she was called upon to face the bar of justice to answer to a charge of manslaughter. Was justice given her? Was she rendered her due?

The prosecution offered an instruction which the Supreme Court of Mississippi had condemned on many occasions. The Record reflects that no objection was made to the instruction by defense counsel. The Court gave the instruction even though the Court surely recognized it had been condemned many times by the Appellate Court.

Could the defense counsel have failed to object by oversight? Could the reporter have failed to properly transcribe? The record is silent. Must Nina Joan Smith be punished for oversight of others? Is this the constant and perpetual disposition to render every man his due? Is this the protection which our constitution guarantees?

POINT TWO

THE SUPREME COURT OF THE STATE OF MISSISSIPPI SHOULD HAVE CONSIDERED THE INSTRUCTION UNDER THE PROVISIONS OF ITS OWN RULE 42 SINCE THIS INSTRUCTION HAD BEEN PREVIOUSLY CONDEMNED BY THE COURT ON NUMEROUS OCCASIONS, IT BEING AN "AT THE VERY INSTANT OF THE FATAL SHOOTING" INSTRUCTION.

In the opinion rendered by the Mississippi Supreme Court relating to the instruction in question, the Court said:

> "The next contention is that instruction Number 7 for the State contains language highly prejudicial to the Defendant, requiring a reversal. The Defendant voiced no objection to this instruction prior to the time it was granted by the trial judge. It falls within the ambit of Mississippi Supreme Court rule 42 which states in part as follows:
>
> 'After having considered the foregoing rule, we are convinced that this rule will aid in promoting better judicial procedure and should be implemented by this Court. It is, therefore, the rule of this Court that specific objections to jury instructions not raised in the trial Court will not be considered on appeal, *except in extreme cases where this Court may raise an objection to a jury instruction in order to prevent injustice.* This rule will take effect and be in force as to all cases tried after June 1, 1971. (Emphasis added.)' See *Mallie v. State,* 271 So.2d 448 (Miss. 1973); *Ferrill v. State,* 267 So.2d 813 (Miss. 1972); *Moore v. State,* 264 So.2d 414 (Miss. 1972); and *Clark v. State,* 260 So.2d 445 (Miss. 1972).
>
> "In view of this rule and the cases cited, we do not reach the argument directed to this instruction."

In view of the instruction having been condemned on numerous occasions by the Court, surely this case should have fallen within the exception to the rule and should have been one that the Court should have considered in order to prevent injustice, in accordance with its rule 42.

The Court's rule provides that in extreme cases the Court may raise an objection to a jury instruction in order to prevent injustice.

Injustice has been defined as the withholding or denial of justice. In law, almost invariably applied to the act, fault, or omission of a Court, as distinguished from that of an individual.

There was no act, fault, or omission on the part of Nina Joan Smith. It was the Supreme Court of Mississippi who omitted considering the instruction which it had condemned on numerous occasions.

By providing for an exception to its general rule, the Court surely recognized that there would be occasion when to strictly conform to the rule would violate the constitutional rights of the accused. By applying its rule strictly and without considering this case as one of its exceptions to the rule and raising an objection to an instruction which improperly stated the law, then the Court has failed to prevent an injustice.

In reviewing the cases which the Court cited as authority it is noted that in *Mallie v. State*, supra, the Court said,

> "The sixth assignment charges error of the lower court in granting the State's instruction number 1. We need not go into the details of the instruction as the appellant in the lower court failed to make any objection to the instruction now complained of. Mississippi Supreme Court rules, rule 42, adopted April 1, 1971, in part states:

> '. . . it is therefore, the rule of this Court that no assignment of error based on the giving of an instruction to the jury will be considered on appeal unless specific objection was made to the instruction in the trial court stating the particular ground or grounds for such instruction . . .' "

It is interesting to note that in *Mallie*, the Court in reciting its rule excluded the portion wherein the exception is made so that the Court may raise an objection to a jury instruction in order to prevent injustice.

In *Moore v. State*, supra, the Court said:

> "Appellant urges that the trial court was in error in granting instruction No. 1 at the request of the State. The record reflects that this case was tried after June 1, 1971, the effective date of Mississippi Supreme Court Rule 42 (here the Court quoted Rule 42) the record does not reflect that appellant made any objection to the instruction now complained of in the trial court, and, consequently, we will not consider this assignment of error."

It now appears that the Supreme Court of the State of Mississippi has taken a firm stand that it will not consider any instruction on appeal unless such has been objected to in the trial court and that such objection has been timely. Since the adoption of its Rule 42 on June 1, 1971, the effective date thereof, we find no case where the Court has brought within the framework of its Rule, a case which they have said was an exception and one wherein they would raise an objection to a jury instruction in order to prevent an injustice.

It has been aptly stated that since all instructions are allowed by the judge, he should take care that they are technically correct. This duty may not be assigned to counsel. Yet, the Supreme Court of the State of Mississippi by its Rule 42 has completely negated this

duty of the trial judge and has in fact assigned this duty to counsel.

The trial judge is, of course, the sole arbiter of the law in the matter of instruction. The trial judge ought never to grant an instruction which has been condemned. But Rule 42 has completely removed this function of the trial judge from his hands and placed it in the hands of counsel.

The trial judge's function as an arbiter and referee is preserved by the requirement that he disclose no bias and exert no influence. But if Rule 42 prevents the trial judge from assuming the function of arbiter and referee, in that he cannot refuse an instruction which has been condemned unless counsel makes a specific objection thereto, then his role as arbiter and referee has been negated as to instructions presented by counsel.

POINT THREE

RULE 42 OF THE RULES OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI MODIFIES AND ABROGATES THE SUBSTANTIVE LAW.

Under the old practice and procedure in the State of Mississippi, whenever an instruction was given by the Court to which counsel objected, counsel had to interpose an objection orally and make an exception if the Court overruled his objection and such exception was noted by Bill of Exception, which became a part of the record.

Historically, this procedure was modified by statute until the present statute was enacted, which is Sec. 1530 of the *Mississippi Code* of 1942, as amended and annotated, and which provides as follows:

"The judge in any cause, civil or criminal, shall not sum up or comment on the testimony or charge the

jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the Court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The Clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the Court, as being 'given' or 'refused', as the case may be, and *all instructions so marked shall be a part of the record on appeal, without a Bill of Exceptions.*" (Emphasis added.)

This statute is presently in force and effect in the State of Mississippi.

As stated, historically it was necessary that an objection be interposed to an instruction given by the Court and should such objection be overruled then an exception was made by way of a Bill of Exceptions which became a part of the record. Under Rule 42 of the State Supreme Court, counsel is now required to interpose any exception he has to the instruction prior to the trial court giving such an instruction to the jury and if he fails to interpose such an exception then the Supreme Court will not consider such instruction on appeal.

Certainly there can be no distinction between the two. It is merely that the cart is now before the horse and an exception to an instruction must be made by counsel prior to the trial court giving an instruction whereas historically the objection and exception was taken after the Court allowed the instruction.

The statute above quoted now provides all instructions given or refused, as the case may be, *shall* be a part of the record, on appeal, *without a Bill of Exceptions.* Rule 42 of the State Supreme Court abrogates this section of the code.

This Court said in *Washington-Southern Navco v. Baltimore and Phila. Steamboat Co.*, 263 U.S. 629, 635, 44 S.Ct. 220, 222, 68 L.Ed. 480 (1924):

"The function of Rules is to regulate the practice of the Court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operations and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the Courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. *Nor can a rule abrogate or modify the substantive law.* This is true, whether the Court which the rules apply be one of law, of equity or of admiralty."

Washington-Southern was cited in *In Re Oliver*, 452 F.2d 111 (1971).

In *Oliver* the Court said:

"Turning to the merits of Oliver's challenge to the validity of the policy statement, it is clear that a rule of Court which violates the constitution or otherwise modifies substantive rights may not stand."

Surely, Rule 42 of the State Supreme Court violates the constitutional rights of Nina Joan Smith, as well as it modifies substantive rights.

As the Court said in *Washington-Southern*, "Most rules are merely a formulation of the previous practice of the Courts."

By no stretch of the imagination does Rule 42 formulate the previous practice of the Courts. On the contrary, it is in direct conflict with the previous practice of the Courts.

Inasmuch as the holding of the Mississippi Supreme Court is not in accord with the constitutional rights and privileges afforded an individual that holding should be reversed and guidance given thereby to the authorities, state and federal, engaged in promulgating rules of Courts.

CONCLUSION

The judgment of the Mississippi Supreme Court, premised as it is on a misconception of this Court's holding on a question of federal constitutional dimension, should be reversed and petitioner requests a reversal.

Respectfully submitted,

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CERTIFICATE

I, Albert S. Johnston, III, of counsel for Appellee, do hereby certify that I have this day, mailed, postage prepaid, a copy of the above and foregoing Petition for Writ of Certiorari to The Honorable A.F. Summer at his office in the Capitol Building Jackson, Mississippi.

Witness my signature this the 24th day of September, 1973.

Albert S. Johnston, III

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI
NO. 47,327

NINA JOAN SMITH

v.

STATE OF MISSISSIPPI

SUGG, JUSTICE:

Nina Joan Smith was indicted and convicted of manslaughter by the Circuit Court of Jackson County. For this crime she was sentenced to a term of ten years in the state penitentiary.

On appeal she contends the trial court erred in denying her motion for a continuance and in granting and refusing certain jury instructions. We affirm.

The needless death by pistol shot of Roland Broadhead resulted from an argument between him and the appellant, the operator of a tavern. She requested Broadhead to leave the premises, emphasizing her statement by drawing a pistol. Broadhead, in refusing to leave, challenged her courage to use it against him. He misjudged, fatally, her temperament, hence this suit.

The evidence is largely concerned with the question of whether the deceased had in his hands, or was about to use, a pool cue "stick" as a weapon against the appellant at the time the shot was fired. The great weight of the evidence indicates that he did have the cue in his hands, but that he was not using it in a threatening or aggressive manner. This issue was resolved by the finding of the jury, and though the sufficiency of the evidence is not

argued for reversal, we believe it appropriate to state there was ample evidence to support the finding of the jury.

It is contended the lower court erred in not granting a continuance to a later term of court. The oral motion was made just prior to the trial when the defense attorney was informed that one of the witnesses for the defendant was incapable, both physically and mentally, of testifying. It did not comply with Section 1520, Mississippi Code 1942 Annotated (1956) relating to continuances due to absent witnesses. Although this witness was not physically absent, we are of the opinion that the application for a continuance based on the inability of the witness to testify due to her illness should be governed by the procedure set forth in Section 1520 when a continuance is sought because of the absence of a witness. The statute requires the application for continuance to set forth the facts which are expected to be proved by the witness. This was not done in this instance and for this reason we cannot state the trial court abused its discretion in denying the continuance. Moreover, the statute provides that a cause shall not be reversed for refusal to grant a continuance unless it appear to this Court that the failure to grant the continuance resulted in an injustice. From a careful review of the record we discern no abuse of discretion by the trial court for the refusal to continue the cause.

The next contention is that Instruction No. 7 for the State contains language highly prejudicial to the defendant, requiring a reversal. The defendant voiced no objection to this instruction prior to the time it was granted by the trial judge. It falls within the ambit of Mississippi Supreme Court Rule 42 which states in part as follows:

> After having considered the foregoing rule, we are convinced that this rule will aid in promoting better judicial procedure and should be implemented by this Court. It is, therefore, the rule of this Court that specific objections to jury instructions not raised in the trial court will not be considered on appeal, except in extreme cases where this Court may raise an objection to a jury instruction in order to prevent injustice. This rule will take effect and be in force as to all cases tried after June 1, 1971.

See Malley v. State, 271 So.2d 448 (Miss. 1973); Ferrill v. State, 267 So.2d 813 (Miss. 1972); Moore v. State, 264 So.2d 414 (Miss. 1972); and Clark v. State, 260 So.2d 445 (Miss. 1972).

In view of this rule and the cases cited we do not reach the argument directed to this instruction.

The appellant next argues that the court erred in refusing to grant the defendant the following instruction:

> The Court instructs the jury for Joan Smith that if you believe from the evidence in this case that Henry Roland Broadhead, who was a man, was stronger and physically more powerful than Joan Smith and that Joan Smith was incapable of combating with him in a physical combat, and was liable to receive serious and great bodily injuries at the hands of Henry Roland Broadhead in the event they became engaged in such combat, then Joan Smith was justified in using a pistol in protecting herself from an unjustifiable and deadly attack of the said Henry Roland Broadhead even though Joan Smith was in no danger whatsoever.

We are of the opinion that the trial court properly refused this instruction since there is no evidence to support it. There is no testimony referring to the physical size of either the deceased or the appellant nor does it

reflect any physical altercation or imminent apprehension of such. In fact Broadhead and the appellant were separated by the bar of the tavern when the fatal shot was fired.

We have considered the record in detail, as well as the briefs of counsel, and overall we cannot state that it contains prejudicial error. The verdict and sentence will therefore be affirmed.

AFFIRMED.

RODGERS, P.J., PATTERSON, SMITH, ROBERTSON AND WALKER, JJ., CONCUR.